

VICTIM'S RIGHTS ENFORCEMENT ARIZONA

2013-2013



President's Task Force on Victims of Crime



This training will:

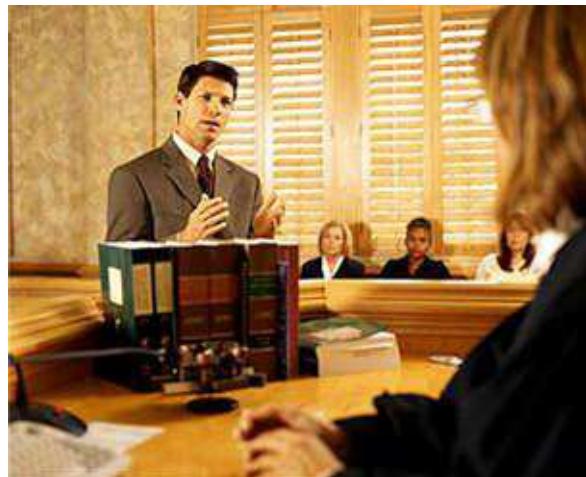
- Provide key case law
- Raise significant issues and most frequent violations
- Discuss ethical issues
- Q and A
- MCAO Technical Assistance
 - Drafting and Arguing Victim's Rights MILs
 - Appellate - Special Action Drafting and Argument

Key Issues

- **Prosecutorial Standing**
- **Due Process/Notice**
- **Definition of “Victim”**
- **Right to be Present**
- **Right to Refuse an Interview/Discovery Request**
- **Right to Confer**
- **Speedy Trial**
- **Plea Agreements**
- **Victim Impact Statements**
- **Restitution**

Prosecutorial Standing....

Prosecutorial Standing...

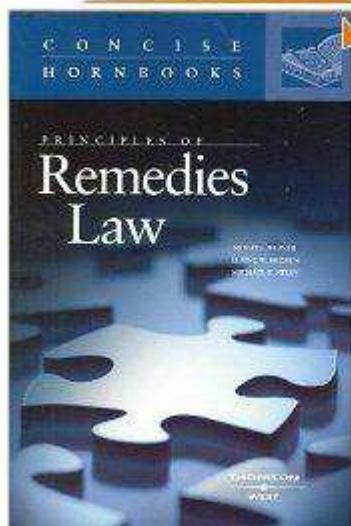


Prosecutorial Standing...

- A.R.S. §13-4437 (C): “At the request of victim, the prosecutor may assert any right to which the victim is entitled.”
- [State v. Lee \(App. Div.2 2011\) 226 Ariz. 234, 245 P.3d 919](#) -- “The victims took the affirmative step of notifying the state they wished to assert their rights to refuse pre-trial depositions and the state has standing to assert those rights on behalf of the victims. See *Warner*, 168 Ariz. at 263, 812 P.2d at 1081; see also Ariz. R.Crim. P. 39(c)(2) (prosecutor has standing to “assert any of the rights to which the victim is entitled”). Nothing in the rules suggests a victim must initiate the discussion about whether rights granted by the VBR are implicated or need to be protected. Nor does there appear any requirement that a victim specify the method by which the prosecutor is to assert those rights. We decline to find an implied requirement in the rule that victims initiate contact or specifically request the appropriate form of proceeding. See Ariz. R.Crim. P. 39(b) (“These rules shall be construed to preserve and protect a victim’s rights to justice and due process.”). Indeed, the rules do not require the prosecutor to obtain a victim’s consent before filing each motion or petition to enforce the asserted rights. Such a requirement would be onerous in cases like this, in which the only means by which relief may be obtained is the filing of a special action petition. See, e.g., *Morehart v. Barton*, 225 Ariz. 269, ¶ 5, 236 P.3d 1216, 1218 (App.2010) (special action jurisdiction accepted because right asserted by victims not capable of protection if reviewed after trial). ”

Victim Remedies...

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Victim Remedies

- **A.R.S. 13-4436. Effect of Failure to Comply**
 - Affectionately known as the “do-over” provision.
 - “The failure to comply with a victim’s constitutional or statutory right is a ground for the victim to request a reexamination proceeding within ten days [T]he court shall reconsider any decision that arises from a proceeding in which the victim’s right was not protected and shall ensure that the victim’s rights are thereafter protected.”
 - Moral of the story – Ensure it is done right the first time.

Definition of a Victim...



Definition of “VICTIM

- Victim themselves;
- Parent, Guardian or Legal Representative of Minor or Vulnerable Adult,
- If Victim is killed or incapacitated: “the person’s spouse, parent, child, grandparent, or sibling, any other person related to the person by consanguinity or affinity to the second degree or any lawful representative of the person **EXCEPT** if the person or the person’s spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused.” A.R.S. §13-4401(19) (amended in 2005); see also, Ariz. Const. Art. II, §2.1 (C), Ariz. R. Crim. Pro. R. 39(a).

Due Process, Fairness, Dignity



Due Process, Fairness, Dignity

- “To preserve and protect victims’ right to justice and due process, a victim has a right ...”
- To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.” Ariz. Const. Art. II, §2.1 (A)(1).
- Most victim issues are rooted in this provision. A few cases:
 - **State v. Hickman**, 205 Ariz. 192, 200 (2003) (Stating that the VBR guarantees ... “a victim’s right to a speedy trial or disposition and prompt and final conclusion of the case after conviction and sentence.” ... Also, “[b]asic rights of respect, protection, participation and healing of their ordeals.”)
 - **State v. Riggs**, 189 Ariz. 327, 942 P.2d 1159 (1997) (Recognizing these rights.)
 - **State ex rel. Romley v. Dairman**, 208 Ariz. 484, 490 (App. Div. 1 2004) (Stating that, “Victims’ rights accrue at the time of arrest or formal charge of the alleged incident and take root as the criminal proceedings progress”). Victim – Not “alleged” victim! I have a MIL to litigate this issue.

Constitutional Right to Notice...



Constitutional Right to Notice...

- **Notice is gateway right.**
- **Right to Notice -triggers rights such as:**
 - **right to be present,**
 - **right to be refuse interview/discovery request,**
 - **right to confer on plea negotiations,**
 - **right to be heard**

Right to Notice ...

- ***State ex rel. Hance v. Arizona Bd. of Pardons and Paroles***, 178 Ariz. 591, 875 P.2d 824, Ariz.App. Div. 1, October 26, 1993:
- “**The constitutional mandate is clear: victims must be informed of their rights.** Armed with this knowledge, victims may choose to exercise these rights. Conversely, an uninformed victim may not exercise her rights because she is unaware of them, or unaware that the right to notice of a release hearing requires that she first file a request for such a notice.”
- “The Victims' Rights Implementation Act also makes clear that the victim's right to be informed imposes a corollary duty on the state to provide the information. This legislation creates specific obligations on state government to inform victims of their rights at various stages of criminal proceedings. See statutes cited in n. 13, *supra*. While the statutory provisions do not specifically address how the state is to inform victims of pre-Bill of Rights crimes, **the overriding principle is clear: the linchpin of Ariz. Const. art. 2, § 2.1(A)(12) is the right of victims to be informed of their constitutional rights, and the state has an affirmative obligation to so inform them.**”

Constitutional Right to Notice

- **Practice tip:**

- Court shall provide notice of criminal proceedings *at least five days before a scheduled proceeding* to allow the prosecutor's office to provide notice to the victim. A.R.S. § 13-4409 (A). If Court violates (A) or (B), can implicate A.R.S. § 13-4436 (Do-Over Provision).
- Section (B) provides an exception if "it is not reasonable" to provide five days. Court must state on the record "why it was not reasonable to provide five days' notice." Ensure Court puts reasoning on the record. May assist in asserting victim's speedy trial rights in the future.

Right to be Present...



11/6/2008

Right to be Present...

- Art. II, Sec. 2.1 (A)(3). Victim has the right ... “[t]o be present at, and upon request, to be informed of all criminal proceedings where the defendant has the right to be present.”
- **Morehart v. Barton**, 226 Ariz. 510 (2011) complicated the issue. A criminal defendant's right to be present pursuant to due process and confrontation clauses does not extend to purely procedural hearings. ... Trial courts must consider if victims' rights are implicated in any ex parte proceeding, and, if so, must enforce the victims' rights unless the result would deprive the defendant of a fair trial. An ex parte hearing related to pretrial mitigation discovery is permitted under [Rule 15.9\(b\)](#) only when the defense has made a proper showing of a need for confidentiality. Victims are not entitled to attend such hearings under [Arizona Constitution, article 2, section 2.1\(A\) \(3\)](#) or [A.R.S. § 13-4420](#), if, as is the case here, the defendant does not have a right to be present. We recognize, moreover, that victims have various rights to participate in court proceedings that are independent of the defendant's right to be present. For example, victims are statutorily entitled to “be given notice of and the right to be heard at any proceeding involving a subpoena for records of the victim from a third party,” [A.R.S. § 13-4071\(D\)](#), and, “on the filing of a notice of appearance and if present, counsel for the victim shall be included in all bench conferences and in chambers meetings and sessions with the trial court that directly involve a victim's right enumerated in [article II, § 2.1, Constitution of Arizona.](#)” [A.R.S. § 13-4437\(D\)](#). Trial courts must consider if such rights are implicated in any ex parte proceeding sought under [Rule 15.9\(b\)](#), and, if so, must enforce the victims' rights unless the result would deprive the defendant of a fair trial. See [U.S. Const. art. VI, cl. 2](#); see also [State v. Riggs](#), 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997) (“[I]f, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield.”); [State v. Bible](#), 175 Ariz. 549, 602-03, 858 P.2d 1152, 1205-06 (1993) (noting that victims' rights cannot conflict with right to a fair trial).

Privacy...



- To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant. Ariz. Const. Art. II, § 2.1 (A)(5).

Privacy

- A victim has a constitutional right to refuse an interview, deposition, or other discovery request by the defendant. Art. II, Sec. 2.1 (A) (5).
- Privacy issues also implicate United States Constitution. If possible, add federal constitutional claim to any MIL fighting a victim privacy violation.
- Defense Interviews/Depositions – V has absolute right to refuse.
- “Other Discovery Request =’s Private Records or Compelled Testing
 - medical records
 - counseling records
 - school records
 - financial records

Privacy

- Most important discovery case: *Brady v. Maryland*, 373 U.S. 83 (1963).
 - Are the victim records in the “custody or control” of the State??
 - If not, due process rights of D are NOT implicated.
 - *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).
 - Confrontation clause is not constitutionally compelled rule of pretrial discovery.
 - In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court’s attention,¹⁶ the prosecutor’s decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State’s files to argue relevance. See *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) (“There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one”).

Privacy

- **Roper Case: Most misunderstood victim discovery case.** *State ex rel Romley v. Superior Court (Roper)*, 172 Ariz. 232 at 240 (1992) (Division One).
- First, Victims have the constitutional right to refuse a discovery request.
- Defendant should only prevail if his due process rights are implicated. Important – Due process rights of D are only implicated if the records are in the custody or control of the State. Note: We have MILs available so that you may respond properly.
- Roper is merely a straight up *Brady* analysis.

Privacy

State ex rel Romley v. Superior Court (Roper), 172 Ariz. 232 at 240 (1992) (Division One). The *Roper* majority states:

- We do not know ... whether the victim has waived this privilege by giving his records to the prosecutor, in which case they are now under the prosecutor's control and obviously subject to *Brady* considerations discussed earlier. *This is the finding that the trial judge must make preliminarily to the other findings in our original order but implied therein. If the trial court determines that the prosecution has the medical records of the victim, then the trial judge must proceed to make the other two findings with we previously directed. These findings are:*
 - 1. *Which portions of the medical records, if any, are essential to the presentation of the defense of self-defense.*
 - 2. *Which portions of the medical records, if any, are essential to the determination of the ability of the victim to perceive, recall, and/or accurately relate the events of the day in question.*
 -
 - *If the medical records have not been made available to the prosecution (or any agent of the state such as law enforcement officers), then the victim has the right to refuse defendant's discovery request under the Victim's Bill of Rights.*
 - *Roper at 239* (emphasis added).



To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant. Ariz. Const. Art. II, § 2.1 (A)(5).

- **Weatherford v. Bursey, 429 U.S. 545, 559 (1977)** (Holding that the state's failure to inform defendant that undercover agent would testify against defendant at trial did not violate defendant's constitutional rights – thus defendant does not have a constitutional right to discovery in a criminal case).
- **State v. Warner, 812 P.2d 1079, 1083 (App. Div. 2 1990)** (Holding that the Arizona Constitutional amendment which allows crime victims to refuse to be interviewed by defendant became effective when amended because defendants have no substantive or vested right in a particular mode of discovery procedure).
- **Very Limited Exception** to Absolute Right to Refuse Discovery Request (Found in Appellate Division 1 after declining to follow Warner):
 - **State ex. Rel. Romley v. Superior Court (Roper, real party in interest), 836 P.2d 445, 451-52 (App. Div. 1 1992)**. (Holding that the information requested must be essential to the defendant's theory of the case).
 - **P.M. v. Gould, 136 P.3d 223, 230 (App. Div. 1 2006)** (Holding that the test for parties requesting information or records from the victim is that the information be "essential" to the case as stated in Roper).
 - Gould narrowed the Roper exception even further.
 - **State v. Connor, 161 P.3d 596, 600-1 (App. Div. 1 2007)** (Stating that Roper did not authorize a wholesale production of the victim's records to the Defendant).

Victim's Right to Refuse a Defense Interview

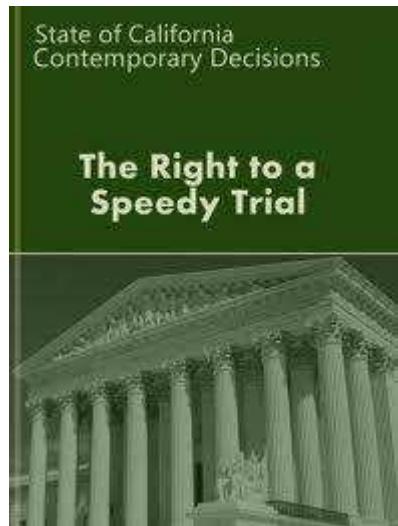


Victim's Right to Refuse a Defense Interview

Case Law Overview:

- **State v. Riggs, 189 Ariz. 327, 942 P.2d 1159 (1997)** (Purpose of right is to protect victim's privacy and to minimize pretrial contact with the defendant and that the right does not prevent defendant from questioning victim at trial about exercising this right.)
- **State ex rel. Romley v. Hutt, 195 Ariz. 256, 987 P.2d 218 (App. Div. 1 1999)** (Holding Federal Constitution's Confrontation Clause did not prevent crime victim from asserting state constitutional right to refuse a pretrial defense interview.)
- **State v. Taggart, 186 Ariz. 569, 925 P.2d 710 (App. Div. 1 1996)** (Recognizing that the court shall instruct the jury that victim has a right to refuse defense interview if defense comments on the refusal).
- **Lincoln v. Holt, 215 Ariz. 21, 156 P.3d 438 (App. Div. 1 2007)**, (Holding parent or legal guardian of minor crime victim who exercises victims' rights on behalf of the victim has a statutory right to refuse a defense interview.)
- **P.M. v. Gould, 194 Ariz. 275, 981 P.2d 575 (App. Div. 1 2006)** (Holding parent of minor or vulnerable adult has standing to assert victim's rights on behalf of that person.)
- **State v. Olquin, 216 Ariz. 250, 165 P.3d 228 (App. Div. 1 2007)** (Holding owner of damaged car could refuse defense interview because a person can be considered a "victim" of an offense for certain purposes even where the statute for the offense does not include a victim as a necessary element of the crime.)
- **State v. Stauffer, 203 Ariz. 551, 553-5 (App. Div. 2 2002)** (Holding that a person who had been previously victimized by the defendant cannot claim victims' rights in a future unrelated proceeding).
- **State v. Sarullo, 219 Ariz. 431, 199 P.3d 686, 690-1 (App. Div. 2 2008)**. (Holding that occupants of a residence can claim victim status in a burglary and had right to refuse an interview.)

Speedy Trial ...



Speedy Trial

- To a speedy trial or disposition and prompt and final conclusion of the case after conviction and sentencing. Ariz. Const. Art. II, §2.1 (A)(10); A.R.S. §13-4435.
- ***State v. Lamar***, 205 Ariz. 431, 72 P.3d 831 (2003) (Holding that the court must consider the defendant's right in conjunction with a victim's constitutional right to a speedy trial.)

Plea Agreements ...



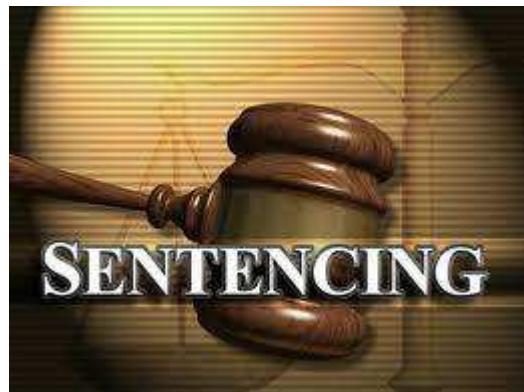
Plea Agreements

Victim's right to confer on disposition of case is a constitutional right. Art. II, Sec. 2.1 (A) (6).

A.R.S. 13-4419 (A). Victim conference with prosecuting attorney. "On request of V, the prosecuting attorney shall confer with the V about the disposition ..., including the V's views about ... a plea....

A.R.S. 13-4423 (B)(1). Plea negotiation proceedings: The Court shall not accept a plea agreement unless: the prosecuting attorney advises the court that before requesting the negotiated plea reasonable efforts were made to confer

Sentencing – PSRs & Victim Impact



Inform the Victim about the right to be heard in the PSR as well as at sentencing via VIS.

- **Sentencing –PSRs and Victim Impact Statements**
- The PSR writer shall consider the V's emotional, physical and financial harm. Different than VIS. This is powerful. Ensure that V knows this right and how to accomplish it. Victim advocates are very helpful in this regard. A.R.S. § 13-4424. V also has a right to inspect the PSR. A.R.S. § 13-4425. Can be very helpful for V to read prior to sentencing.
- A.R.S. 13-4426. Sentencing. As an exercise of V's constitutional right to be heard at sentencing, before the imposition of sentencing the V may address the sentencing authority and present any information or opinions that concern the V or V's family, the harm caused by the crime, the criminal offense, the defendant, the need for restitution or the sentence to be imposed

Right to be Heard at Sentencing ...

- **A.R.S. 13-4426.01.** V's right to be heard is exercised not as a witness, the victim's statement is not subject to disclosure to the state or the defendant or submission to the court and the victim is not subject to cross-examination. The state and the defense shall be afforded the opportunity to explain, support or deny the victim's statement.

Right to be Heard in a Death Penalty Case...

Right to be Heard in a Death Penalty Case...

- If you work death penalty cases (or want to), mandatory reading: *Payne v. Tennessee*, 501 U.S. 808 (1991) and AZ progeny. *Payne* is the ultimate authority re. VIs during penalty phase of capital trial.
- Please call if you are working with Vs in such a case. Since 2002, I have represented numerous Vs in capital cases and this is a tricky area with quite a bit of litigation. This is the only procedural moment when a victim directly addresses a jury! I have several MILs that can assist. I am also available for oral argument.

Restitution...



Restitution

- *State v. Wilkinson* 202 Ariz. 27, 39 P.3d 1131 (Ariz. 2002).
 - **Economic**
 - “Economic Loss” means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other losses that would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages. A.R.S. §13-105(16).
 - **Directly Caused by Defendant’s Crime(s)**
 - **Not Caused by Intervening Factor**

Restitution is...

- Lost Wages
 - FUTURE lost wages included
 - Can be compensated for using leave
- Funeral Expenses
- Counseling/Medical Expenses
- Re-locating Victim for Safety Reasons
- Value of Damaged or Stolen Property
- ANY expense that fits Wilkinson (we obtained restitution for a healing ceremony with medicine man for a tribal client)

Restitution

- To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury. Ariz. Const. Art. II, §2.1 (A)(8); A.R.S. §§ 13-603(C); 13-804
 - **State v. Lindsley**, 191 Ariz. 195, 953 P.2d 1248 (App. Div. 1 1997). (Holding that the purposes of criminal restitution include reparation of the victim and rehabilitation of the defendant.)
 - **State v. Iniguez**, 169 Ariz. 533, 536, 821 P.2d 194, 197 (App. Div. 1 1991) (Holding the court has discretion in setting the restitution amount and it will be upheld if it is reasonably related to the crime victim's loss.); see also *State v. Freeman*, 174 Ariz. 303, 848 P.2d 882 (1993).
 - **State v. Hansen**, 215 Ariz. 287, 160 P.3d 166 (2007) (Holding that restitution payments to the victim should not be stayed during appeal.)
 - **State v. Madrid**, 207 Ariz. 296, 85 P.3d 1054 (App. Div. 1 2004) (Holding that reasonable expenses associated with attendance of victim's children at trial qualified as economic losses, and thus, children were entitled to restitution.)
 - **State v. Guilliams**, 208 Ariz. 48, 51-53 (App. Div. 2 2004) (Rejecting a claim that A.D.O.C. could not be considered a victim, and thus was not entitled to restitution).
 - **In re Brendan G.**, --- P.3d --- 2009 WL 1110310 (App. Div. 1 2009) (Holding that a juvenile was liable in restitution damages, not consequential damages, for interest accrued on a dental credit account which was opened to fix victim's teeth after an assault).
 - **State v. Wilkinson** 202 Ariz. 27, 39 P.3d 1131 (Ariz. 2002). (Holding that proper restitution expenses are 1) economic, 2) directly caused by the defendant's actions, and 3) not caused by intervening events.)

ETHICS



The Victim Is Not Your Client...



The Victim Is Not Your Client

- No Attorney/Client Privilege
 - The Victim may not understand this and may provide you with information you do not want in an effort to be helpful.
 - Ex. Victim provides her private counseling records from the treatment she received as a result of the crime. These records are likely protected against disclosure as long as they are not in the State's possession.
 - The Victim may be expecting legal advice from you.
 - ER 4.3 requires you correct a misunderstanding of your role. Instead of correcting a misunderstanding, begin the conversation explaining the role of a prosecutor and the rights that are guaranteed to the victim.
 - You may inform them of their rights and you may assert their rights for them. Discuss this role ahead of time. If possible, document the victim's request for assistance should a violation occur.

Ethics & Prosecutors

ER 3.8.

**Special Responsibilities of a
Prosecutor**

Ethics & Prosecutors

- **ER 3.8. Special Responsibilities of a Prosecutor**
- The prosecutor in a criminal case shall:
 - (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
 - (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
 - (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
 - (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
 - (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
 - (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6 or this Rule.

Ethics and Victims Rights

○ What MUST you do?

- Inform**
- Confer**
- Treat Victim with Respect
and
Dignity**

You MUST do the following:

- INFORM
 - Of criminal proceedings
 - Of victim's rights
 - Of disposition
- CONFER
 - On disposition
 - Victim has the right to be heard on a plea
- TREAT VICTIM WITH RESPECT AND DIGNITY
 - **ER 4.4. Respect for Rights of Others**
 - In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.

Represented Victim



Represented Victim ...

- **ER 4.2. Communication with Person Represented by Counsel**
- In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

What if the Victim asks about a civil lawsuit?



What if the Victim asks about a civil lawsuit?

- Advise the Victim that they should seek the advice of a civil attorney as soon as feasible as there are statutes of limitations. ER 4.3
- Be aware of issues impacting your case:
Civil attorneys may insist that the Victim give a deposition in the civil case before the criminal case is resolved. The Victim likely won't understand the impact of giving sworn statements about the crime before trial. Civil courts can and usually will stay the civil matter.

Resources

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